UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: | Case No. 10-13652

Christina Vanarthos & George Vanarthos, | CH 7

Debtors | Adv. No. 10-03763-mg

Chase Bank USA, N.A.,

Plaintiff,

v.

Christina Vanarthos,

Defendant

RESPONSE TO DEFENANT'S MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS ON BEHALF OF CHASE BANK USA, N.A.

Now comes Plaintiff Chase Bank USA, N.A., through counsel, and responds to the Defendant's motions as follows:

1. On October 20, 2010, the Defendant filed a Motion to Dismiss for failure to State a Claim upon which Relief can be granted pursuant to Federal Rule of Bankruptcy Procedure 7012(b), and Federal Rule of Civil Procedure 12(b)(6).

2. The Defendant filed an answer to the Complaint prior to filing the Motion to Dismiss.

3. Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b) provide that the defense of failure to state a claim upon which relief can be granted must be filed before the answer is filed.

4. Chase Bank USA, N.A. asserts that it is relying upon the Defendant making a false representation as to a present intent to repay the extension of credit and not upon the actual fraud component of 11 U.S.C. § 523(a).

5. Chase Bank USA, N.A. asserts that the facts alleged are sufficient to establish a claim for relief under 11 U.S.C. § 523(a)(2).

WHEREFORE, Chase Bank USA, N.A. asks this court to deny the Defendant's motion.

STANDARD FOR REVIEW

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, Bell Atlantic Corp. v. Twombly, 550 U. S.544, at 555, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim for relief when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. Two working principles underlie Twombly. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. *Id.*, at 555. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.*, at 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

In deciding a motion brought under 12(b)(6), a court "must accept all factual allegations on the complaint as true, draws all inferences in favor of the plaintiff and [should dismiss] only if plaintiff fails to provide factual allegations sufficient to raise a right to relief above a speculative level." In re Ades and Berg Group Investors, 550 F.3d 240, 243 n. 4 (2d Cir. 2008); Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999); Kost v.Kozakiewicz, 1 F. 3d 176, 183 (3d Cir. 1993).

Even if a complaint is vulnerable to 12(b)(6) dismissal, "a court should not dismiss it without granting the plaintiff leave to amend at least once," Okoi v. El Al Israel Airines, 2010

WL 1980263 at *1 (2d Cir. 2010); Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999).

For purposes of a motion to dismiss, the should construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) (citing Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)). A court may not dismiss an action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Branum v. Clark, 927 F.2d 698, at p. 705 (2d Cir.1991).

STATEMENT OF FACTS

From March 1, 2010, 130 days before the entry of the Order for Relief, through April 6, 2010, 94 days before the entry of the Order for Relief, and a period of only 36 days, Christina Vanarthos incurred 60 charges on account xxxx-xxxx-xxxx-9727 totaling $ 3,836.16. A true and correct copy of the Statement of Account is attached hereto and made a part of this response.

From March 1, 2010, until the entry of the 130 days later, Christina Vanarthos made zero payments on account xxxx-xxxx-xxxx-9727 which had an account balance of $ 41,095.35.

Christina Vanarthos set forth in the schedules that she had monthly expenses of $ 7,006.69 and a net monthly income of $ 6,885.98 which leaves ($ 120.71) each month for the payment of unsecured debt totaling $ 88,182.70 as set forth in the schedules.

Christina Vanarthos set forth in the schedules that she has assets of $ 18,781.00 and liabilities of $ 107,867.70 which renders Christina Vanarthos insolvent pursuant to 11 U.S.C. § 101(32).

ARGUMENT

The Second Circuit has not yet addressed the applicability of § 523(a)(2)(A) in the context of credit card debt. Most courts that have addressed the issue, including the bankruptcy court in this case, have concluded that a creditor seeking to have a debt declared nondischargeable under § 523(a)(2)(A) must prove by a preponderance of evidence: (1) that the debtor made a representation; (2) knowing it was false; (3) with the intent to deceive the creditor; (4) upon which the creditor actually and justifiably relied; and (5) that the creditor sustained a loss as a proximate result of its reliance upon the statement. AT & T Universal Card Services v. Mercer (In re Mercer), 246 F.3d 391, 403 (5th Cir.2001); Rembert v. AT & T Universal Card Services (In re Rembert), 141 F.3d 277, 280-81 (6th Cir.1998), cert. denied, 525 U.S. 978, 119 S.Ct. 438, 142 L.Ed.2d 357 (1998); Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (8th Cir. BAP 2000); Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280, 1284 (9th Cir.1996).

Under the "totality of the circumstances" theory, which was established in In re Faulk, 69 B.R. 743, 757 (Bankr. N.D. Ind. 1986) and Rembert v. AT & T Universal Card. Services (In re Rembert), 141 F.3d 277, (6th Cir.1998), and adopted by the Ninth Circuit Bankruptcy Appellate Panel in In re Dougherty, 84 B.R. 653 (Bankr. 9th Cir. 1988), a court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor. In re Faulk, 69 B.R. at 755.

In Dougherty the Bankruptcy Appellate Panel for the Ninth Circuit set out twelve nonexclusive factors to be considered in determining the debtor's intent. These factors are:

1. The length of time between the charges made and the filing of bankruptcy;

In the case now before the Court 60 charges were incurred during a 36 day period between 130 days and 94 days before the entry of the Order for Relief (with no payments).

2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

In the case before the Court it does not appear that the Defendant consulted a bankruptcy attorney before obtaining the case advances.

3. The number of charges made;

In the case now before the Court the Defendant incurred 60 charges during a 36 day period.

4. The amount of the charges;

In the case now before the Court the Defendant incurred $ 3,836.16 in charges.

5. The financial condition of the debtor at the time the charges are made;

In the case now before the Court defendant was hopelessly insolvent and her monthly expenses exceeded her net monthly income by $ 120.71. The defendant also had $ 88,182.70 of unsecured debt. The Defendant's intent not to repay can be inferred from her hopeless insolvency. In Re Boydston, 520 F.2d 1098, (5th Cir.1975).

6. Whether the charges were above the credit limit of the account;

The Defendant incurred a balance of $ 41,095.35 on account xxxx-xxxx-xxxx-9727 which had a credit limit of $ 35,000.00. This establishes that the Defendant exceeded the credit limit by $6,095.35.

7. Whether the debtor made multiple charges on the same day;

The Defendant incurred more than 1 charge per day on several occasions.

8. Whether or not the debtor was employed;

The Defendant was employed.

9. The debtor's prospects for employment;

The Defendant was employed.

10. Financial sophistication of the debtor;

The financial sophistication of the Defendant is unknown but the Defendant's spouse was employed by a law firm.

11. Whether there was a sudden change in the debtor's buying habits; and

It appears that the actions were a drastic change in the Defendant's habits because in the 59 days prior to the spending spree of the Defendant, the Defendant made 4 payments on the account totaling $ 5,260.91 but made no payments within 130 days of the entry of the Order for Relief.

12. Whether the purchases were made for luxuries or necessities.

It appears that a fair number of the purchases were not reasonably necessary for the maintenance and support of Christina Vanarthos nor a dependent of Christina Vanarthos.

Under this approach, the bankruptcy court must consider these factors to determine whether the debt was incurred through actual fraud, i.e., where the debtor made the charges with no intention of paying for the goods or services. In re Dougherty, 84 B.R. at 657.

WHEREFORE, Chase Bank USA, N.A. asks this Court to deny the motion, or in the alternative allow Plaintiff leave to amend its complaint.

DATED: November 18, 2010

__/s/ Glenn D Miller______

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